UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SIMON ZERABRUK, Petitioner, v. ICE FIELD OFFICE DIRECTOR, Respondent.	CASE NO. C10-1572-RAJ-MAT REPORT AND RECOMMENDATION RE: INDEFINITE DETENTION

I. INTRODUCTION AND SUMMARY CONCLUSION

Simon Zerabruk ("petitioner") is a native of Ethiopia and a citizen of Eritrea who has been detained by the United States Immigration and Customs Enforcement ("ICE") since September 22, 2010, pursuant to an order of removal that became final on April 2, 2010. On November 3, 2010, petitioner, proceeding pro se, filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, which seeks his release from custody. (Dkt. 7.) Respondent has filed a motion to dismiss, arguing that petitioner is subject to a final order of removal and is lawfully detained under Section 241 of the Immigration and Nationality Act ("INA"). (Dkt. 11.)

For the reasons set forth below, the Court recommends that petitioner's habeas petition be GRANTED, and respondent's motion to dismiss be DENIED.

II. BACKGROUND AND PROCEDURAL HISTORY

Petitioner is a native of Ethiopia and a citizen of Eritrea. Administrative Record ("AR") at R11. On or about June 18, 2009, he filed an I-589 application for asylum with the asylum office in San Francisco, California. (AR R2-11.) The asylum office found petitioner's claim not credible and referred petitioner's application to an immigration judge ("IJ") for adjudication in removal proceedings. (AR R50.) On July 29, 2009, the Department of Homeland Security ("DHS") served petitioner with a Notice to Appear, charging him as subject to removal from the United States pursuant to INA § 212(a)(6)(A)(i), for being present in the United States without being admitted or paroled. (AR L112-13, L135.)

On September 1, 2009, petitioner appeared with counsel before an IJ and admitted all the allegations contained in the Notice to Appear and conceded his removability, but renewed his applications for asylum, withholding of removal, and protection under the Convention Against Torture. (AR L321-22.) On March 2, 2010, the IJ denied petitioner's applications for relief and ordered him removed to Eritrea. (AR L257.) Petitioner reserved appeal but never filed an appeal of the IJ's decision with the Board of Immigration Appeals ("BIA"). (AR L257, L321.) Accordingly, petitioner's order of removal became administratively final on April 2, 2010. *See* INA § 101(a)(47)(B)(ii), 8 U.S.C. § 1101(a)(47)(B)(ii); 8 C.F.R. § 1003.38(b).

On May 28, 2010, petitioner, represented by new counsel, filed a motion to reopen removal proceedings with the immigration court, which denied the motion on August 25, 2010.

(AR L258-301, L319-22.) Petitioner appealed the denial of his motion to reopen to the BIA on September 27, 2010. (AR L334.) His appeal remains pending with the BIA. (AR L334.)

On September 22, 2010, petitioner was taken into immigration custody pursuant to a final order of removal to Eritrea. (Dkt. 13, Decl. of Jose H. Arroyo.) In a Declaration submitted to the Court, however, Deportation Officer Jose H. Arroyo states that, as of December 3, 2010, "ICE has been unable to secure any travel documents for Mr. Zerabruk," and that travel documents to Eritrea "are extremely difficult to procure." *Id.* He further states that "it is extremely difficult to identify and engage with the appropriate Eritrean authorities in order to produce the requisite travel documents," and that "ICE cannot state with certainty that Mr. Zerabruk will be issued travel documents by his government within the next 12 months." *Id.* Deportation Officer Arroyo indicates that petitioner has been cooperative with ICE officials. *Id.* The Administrative Record contains no further information regarding efforts to obtain travel documents for petitioner's removal to Eritrea. ICE has provided no evidence that it has conducted a review of petitioner's custody since he was detained on September 22, 2010.

On November 3, 2010, petitioner filed the instant habeas petition, challenging his detention. (Dkt. 7.) Respondent filed a Return and Motion to Dismiss (Dkt. 11) on December 3, 2010, and petitioner filed a response (Dkt. 15) on December 20, 2010. Respondent did not file a reply.

III. DISCUSSION

"When a final order of removal has been entered against an alien, the Government must facilitate that alien's removal within a 90-day 'removal period.'" *Thai v. Ashcroft*, 366 F.3d 790, 793 (9th Cir. 2004)(citing *Xi v. INS*, 298 F.3d 832, 834-35 (9th Cir. 2002)); INA §

241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A)("Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')"). The removal period begins on the *latest* of the following:

> (i) The date the order of removal becomes administratively final.
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> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
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> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B); *see also Khotesouvan v. Morones*, 386 F.3d 1298, 1300 n.3 (9th Cir. 2004)(stating that the 90-day removal period commences on "the date the order of removal becomes final; the date a reviewing court lifts its stay following review and approval of the order of removal; or the date the alien ordered removed is released from non-immigration related confinement."). During the removal period, continued detention is required. *See* INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) ("During the removal period, the Attorney General shall detain the alien."). "If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General." INA § 241(a)(3), 8 U.S.C. § 1231(a)(3). Those regulations require that before making a decision on whether to release a detainee, a determination must be made as to whether travel documents are immediately available, whether the detainee is nonviolent, whether the detainee is likely to pose a threat to the community following release, whether the detainee is likely to violate the conditions of release, and whether the detainee poses a

significant flight risk if released. *See* 8 C.F.R. § 241.4(e).

Where removal cannot be accomplished within the ninety-day removal period, detention of certain aliens beyond the removal period is authorized by INA § 241(a)(6), 8 U.S.C. § 1231(a)(6); *see Zadvydas v. Davis*, 533 U.S. 678, 682, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). In *Zadvydas*, the Supreme Court determined that the government is entitled to a presumptively reasonable period of detention of six months to bring about the alien's removal from the United States. *Zadvydas*, 533 U.S. at 701. After this six month period, the alien is eligible for conditional release upon demonstrating that there is "no significant likelihood of removal in the reasonably foreseeable future." *Id.*

In the present case, the immigration judge entered an order of removal on March 2, 2010, and no appeal was taken. (AR L257, L321.) Thus, petitioner's order of removal became administratively final on April 2, 2010, upon expiration of the 30-day appeal period, thereby commencing the 90-day removal period. *See* INA § 101(a)(47)(B)(ii); INA § 241(a)(1)(B)(i), 8 C.F.R. § 1241.1(c). Accordingly, the 90-day removal period expired on or about July 2, 2010, and the presumptively reasonable six-month period in *Zadvydas* expired on or about October 2, 2010.

Respondent argues that the presumptively reasonable six-month period of detention has not expired. (Dkt. 11 at 6.) Rather, respondent contends that the 90-day removal period was triggered and began to run on September 21, 2010, the day petitioner was taken into ICE custody, and that the presumptively reasonable period under *Zadvydas* will not expire until March 21, 2010. *Id.* Thus, according to respondent, petitioner's detention remains lawful under INA § 241 and *Zadvydas*. *Id.* Respondent's argument is contrary to the plain language

of the statute.

As indicated above, INA § 241(a)(1)(B) provides that the removal period begins to run on the latest of the following: the date the removal order becomes final; the date a reviewing court lifts its stay following review and approval of a final order; or the date the alien ordered removed is released from non-immigration related detention. *See* INA § 241(a)(1)(B)(i)-(iii). Thus, petitioner's removal period began on April 2, 2010, the date his removal order became administratively final, unless §§ 241(a)(1)(B)(ii) or (iii) dictate a later date. *See Diouf v. Mukasey*, 542 F.3d 1222, 1229-30 (9th Cir. 2008). The Court finds neither section dictates a later date. Nor does the fact that petitioner was not taken into ICE custody until September 21, 2010, change the analysis. *See Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 499 (S.D.N.Y. 2009)(rejecting the government's argument that the removal period did not begin until the petitioner was taken into custody); *Ulysse v. Dep't of Homeland Sec*., 291 F. Supp. 2d 1318, 1325 (M.D. Fla. 2003)(finding the government's argument that the removal period did not begin until the petitioner was taken into custody "flies in the face of the plain reading of the statute and Congress' intent that removal of the alien . . . should be done within 90 days of the removal order being final."); *Habtegaber v. Jenifer*, 256 F. Supp. 2d 692, 697 (E.D. Mich. 2003)(same). The Court, therefore, finds, under the clear and unambiguous language of the statute, the petitioner's removal period began on April 2, 2010, the date his order of removal become administratively final, and the removal period, along with the presumptively reasonable six-month detention period, has lapsed.

The Court must, therefore, determine whether petitioner has shown that "there is no significant likelihood of removal in the reasonably foreseeable future," and if so, whether the

government has responded with "evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 701. The Court finds that petitioner has satisfied his burden of showing that there is no significant likelihood of removal in the reasonably foreseeable future, and that respondent has failed to rebut that showing.

As petitioner points out, ICE has conceded that he has cooperated with efforts to obtain travel documents for his removal, nevertheless, ICE cannot state that any travel documents will be issued within the next 12 months. (Dkt. 15 at 4; Dkt. 13.) The government has contacted the Eritrean Consulate and requested a travel document for petitioner's removal, however, the request remains pending. (Dkt. 15 at 4; Dkt. 11 at 6.) ICE indicates that, "[i]n theory, Eritrea does repatriate its citizens; however, in practice it is extremely difficult to identify and engage with the appropriate Eritrean authorities in order to produce the requisite travel documents." (Dkt. 13.) Respondent contends, "[a]lthough ICE is not overly optimistic that a travel document will be issued, there is currently no evidence that the request will be ultimately denied." (Dkt. 11 at 7.) This is not sufficient evidence to rebut petitioner's showing. Contrary to respondent's claims, he has not demonstrated to this Court that a travel document will issue or that petitioner's detention should continue. Because petitioner's removal is no longer reasonably foreseeable, his detention is no longer authorized by INA § 241(a)(6).

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IV. CONCLUSION

For the foregoing reasons, I recommend that the Court GRANT petitioner's petition for writ of habeas corpus and order respondent to release him subject to supervision under INA § 241(a)(3) and the regulations prescribed by the Attorney General under 8 C.F.R. § 241.5(a). A proposed order accompanies this Report and Recommendation.

DATED this 27th day of January, 2011.

Mary Alice Theiler
United States Magistrate Judge